Equity Generation Lawyers

ALERT for investors in Australia's energy transition

Australia's energy transition market faces imminent integrity risks

Why investors should care about a proposal backed by corporate Australia, and what investors can do about it

Equity Generation Lawyers

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*The Australian government proposes to protect large companies in the energy transition from investor legal accountability for three years. The proposal removes a critical avenue for price discovery. It undermines a new climate-related financial disclosure regime and thwarts Australia's goal to increase the isolated nation's attractiveness as a destination for international capital. This paper examines why the proposed immunity is misguided. We explain why the concerns of Australian businesses about implementing International Sustainability Standards Board (**ISSB**) standards are unjustified and contrary to investor interests. Investors now have a limited window to engage with Australia on its climate policy to protect market integrity.*

Introduction

1. The Australian government is proposing to provide immunity from private legal action for company climate transition plans for three years. It will undermine the goals of the proposed disclosure regime to implement standardised ISSB international climate change related metrics. The attendant policy goal is to make Australia an attractive destination for international capital, but the immunity undermines that goal and mutes the price discovery ability of investors.

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2. The immunity is rejected by industry groups, independent barristers, lawyers and asset managers.[2] Lobbying from Australia's business community appears to be the driving force behind the proposal. This paper sets out independent litigation barristers' advice and for the first time provides an analysis of the appropriate protections to business in the underlying standards. Both have been underplayed or ignored in the debate as big business attempts to avoid litigation that seeks to call out misconduct and deceptive behaviour. We also highlight the ISSB's views on prospective immunity and show how Australia's proposal represents a globally unprecedented overreach.

3. The latter part of this paper analyses the role of private litigation in enhancing market integrity and its price discovery function. We look at the limited, and so far theoretical, exposure faced by Australian directors from climate-related investor litigation and the perverse market signal being sent by the Australian government to businesses that implicitly endorses substandard governance systems. We conclude that the critical motivation behind the proposed immunity arises out of self-serving attempts by larger corporate interests to stymie the type of legitimate legal action that has occurred in Australia - litigation that ultimately protects investors and market integrity.

4. Finally, this paper provides international investors a roadmap on how to ensure Australia's policy settings maintain appropriate accountability mechanisms to ensure the market integrity required to maximise investment opportunities.

Background

5. Australia's proposed new regime on climate disclosures is intended to start from 1 January 2025 but is subject to legislation being passed in the Senate.[3] The new regime requires the publication of a 'sustainability report' alongside the normal parts of company annual reports – directors' reports and financial statements. The contents of the sustainability report are determined by underlying accounting standards. Those standards intend to import international reporting standards and create a standardised

[2] Responsible Investor, *Aussie industry groups criticise legal immunity for sustainability* reporting, 2 July 2024: https://www.responsible-investor.com/aussie-industry-groups-criticise-legal-immunity-for-corporate-sustainability-reporting/; The Guardian, *Climate plans of Australian companies would be exempt from private litigation for three years under proposal*, 15 July 2024: https://www.theguardian.com/australia-news/article/2024/jul/15/climate-plans-of-australian-companies-would-be-exempt-from-private-litigation-for-three-years-under-proposal.

[3] https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7176.

benchmark to assist investors. The accounting standards are now in draft, but no significant changes are expected.

6. The standards broadly reflect the existing position at law for required material disclosures of any kind however they codify the climate change information that ought be disclosed.

Barristers' advice to investor industry groups

7. The International Sustainability Standards Board (**ISSB**) published draft International Financial Reporting Standards (**IFRS**) on sustainability and climate-related disclosures in March 2022. Australia's intention to implement them has been beset by alarmist calls for a safe harbour and legal immunity for companies and their directors. In an attempt to cut through misinformation, investor industry groups sought advice from respected barristers on potential director liability under the then draft ISSB standards and the requirement for safe harbours. That advice was dated December 2022 and published in February 2023. It concluded:[4]

> from our perspective as *litigators*, a specific "safe harbour" aimed at climate and/or sustainability-related disclosures is not necessary or desirable. The ISSB Draft Standards will likely assist in *exposing* bad practice, in *improving* sub-standard practice (by providing a consistent framework against which sub-standard practice can be improved), and in *standardising* the reporting and disclosure which accompanies good practice. A safe harbour would only undermine those beneficial effects, by removing the effective incentive (liability risk) which will actuate them.

8. The barristers analysed the ISSB Draft Standards, as they then were, and concluded:[5]

> In our opinion, the ISSB Draft Standards require disclosure of material information about sustainability risks in a manner which is *broadly* consistent with existing requirements that apply to listed companies in Australia, and requires

[4] The advice was prepared for industry groups the Australian Council of Superannuation Investors Limited, the Investor Group on Climate Change and Responsible Investment Association of Australasia by barristers Sebastian Hartford-Davis and Kellie Dyon (**Hartford-Davis Advice**). See [6d] https://igcc.org.au/wp-content/uploads/2023/01/Advice-on-ISSB-Draft-Standards-Final.pdf ; https://igcc.org.au/legal-advice-directors-climate/.

[5] Ibid, paragraph [6a].

disclosure of things which company directors should *already* be considering in the proper discharge of their duties as directors. In this sense, for diligent company directors properly supported by competent management, the ISSB Draft Standards will not increase directors' exposure.

9. Fifteen months later, draft Australian standards were published that were intended to reflect the ISSB Standards. They were drafted with the Australian context in mind and provided additional protection for companies and directors than both the existing legal framework in Australia and the draft ISSB Standards. To date, the barristers' advice has been largely ignored in the debate around the incoming Australian regime. Similarly, the protections in the underlying accounting standards that address measurement uncertainty and data availability, the key concerns for companies, have not been highlighted. This paper fills that void by analysing the guardrails in those standards.

The Australian context

10. Australian standards and the proposed legislation implementing them have arisen from a consultation process initiated by the Department of Treasury. The process attracted significant engagement by the Australian Institute of Company Directors (**AICD**). The AICD expressed concern about liability given the uncertainty and lengthy time frames associated with climate disclosures.[6]

11. Those concerns were considered by the Australian Accounting Standards Board (**AASB**) when it drafted the underlying standards and informed the protections in them. However, AICD's submission on **the Bill**[7] uses the justifications for protections in the sustainability standards as if those protections did not exist. The AICD continues to advocate for an extensive legislative safe harbour that will protect misconduct by polluting entities and their backers. The legislative safe harbour applies to transition plans.

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[6] For example, see: Louise Petschler, 'Update on mandatory climate reporting legislation', *Australian Institute of Company Directors* (Web Page, 1 July 2024) <https://www.aicd.com.au/risk-management/framework/climate/update-on-mandatory-climate-reporting-legislation.html>.

[7] Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024, available at <https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r7176_first-reps/toc_pdf/24042b01.pdf;fileType=application%2Fpdf> ('Bill').

12. In stark contrast, when releasing international standards, the ISSB suggested that jurisdictions consider only potential safe harbours to address data availability challenges.[8] There is no intention from the ISSB for jurisdictions to protect companies from unilateral company promises on how to navigate the transition to comfort investors. These are transition plans.

13. To elaborate, transition plans are bespoke company plans that have been consistently made by large emitters, banks and superannuation funds (pension funds) since the Paris Agreement. They are not standardised disclosures that investors can readily compare. However, they are influential amongst institutional and retail investors, bank customers and fund beneficiaries. Particular attention is paid to them in Australia given the concentration of fossil fuel producers and banks among the top ASX listed companies, and the heft of superannuation funds in the economy.

The role of corporate interests

14. In a submission in response to Treasury's initial consultation paper in early 2023, the Business Council of Australia was one of the first entities advocating for the inclusion of an immunity or 'safe harbour provision' for disclosures such as forward looking statements and scope 3 emissions due to concerns about 'liability risks for individual directors and officers, and companies'[9]. The *Mandatory climate-related financial disclosures - Policy Position Paper* subsequently published by Treasury in September 2023 included a proposed 3-year period of immunity[10] as referred to in paragraph 21 below.

15. Further, when the Bill was before the parliamentary Senate committee in April 2024, the AICD lobbied the Australian parliament to maintain the immunity - the same immunity that the independent barristers said would undermine the beneficial effects of the new regime. AICD's submission on the Bill stated:[11]

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[8] https://www.ifrs.org/content/dam/ifrs/meetings/2022/december/issb/ap4b-climate-related-disclosures-scope-3-greenhouse-gas-emissions.pdf at [95]-[98].

[9] Business Council of Australia, *Climate-related Financial Disclosure Consultation paper: BCA submission* (February 2023), 14-15, available at <https://treasury.gov.au/sites/default/files/2023-04/c2022-314397-bca.pdf>.

[10] Department of Treasury, *Mandatory climate-related financial disclosures - Policy Position Paper,* September 2023, 29: https://treasury.gov.au/sites/default/files/2024-01/c2024-466491-pia.pdf.

[11] Australian Institute of Company Directors, Submission 15 to Senate Economics Legislation Committee, *Senate Inquiry into the Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024* (11 April 2024), 3, available at <https://www.aph.gov.au/DocumentStore.ashx?id=1337caa3-0c2d-4aa2-aee4-d5249b3c600e&subId=754426>.

It is imperative that the Modified Liability regime, which covers the most uncertain disclosures remains in its current form. Many forward looking disclosures required under the Sustainability Standards suffer from a high degree of measurement and outcome uncertainty and are highly novel in the Australian market. These uncertainties relate to the requirement to make projections many years or even decades into the future, on the basis of incomplete or unknown information or assumptions.

16. As we will outline below, those forward looking statements are protected by the underlying sustainability standards. Existing safeguards under current laws map to those protections as well as provide another layer of comfort to ensure that competent management and directors will not face prosecution.

17. Accordingly, we conclude that the AICD's position is misconceived: immunity from private litigation related to transition plans is not required to protect measurement and outcome uncertainty. This paper then asks the question: why else do company directors need broader immunity?

Australian Sustainability Standards

18. At the outset, it is important to note that the *content* of the required climate disclosures in the new regime is not dictated by the proposed legislation.[12] The content of the disclosures is dictated by the underlying ***sustainability standards***[13] which are, in turn, incorporated into the proposed legislation.[14] The standards aim to adopt the IFRS Standards in an Australian context.[15] This has led to the standards including wording that reflects current legal principles on disclosures and the management of risks and opportunities.

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[12] Explanatory Memorandum, Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024 [4.73] <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r7176_ems_dd1e1136-f342-4dbf-8eae-9db60d977f84/upload_pdf/JC012553.pdf;fileType=application%2Fpdf#search=%22legislation/ems/r7176_ems_dd1e1136-f342-4dbf-8eae-9db60d977f84%22>. ('EM'). This could be subject to exceptions arising from potential amendments to the bill proposed by the Labour Party in the Senate that deal with scenario analysis.

[13] Australian Accounting Standards Board, Sustainability Report Exposure Draft ED SR1, *Australian Sustainability Reporting Standards – Disclosure of Climate-related Financial Information*, <https://www.aasb.gov.au/admin/file/content105/c9/AASBED_SR1_10-23.pdf>. ('AASB ED SR1').

[14] Bill, s 296C.

[15] AASB ED SR1 [BC12].

19. The standards are currently in draft dated October 2023. The standards are created by the Australian Accounting Standards Board (**AASB**) which is, at the date of this paper and according to the AICD, currently "analysing" them.[16] Significant changes to the standards are unlikely given that parliament bases the proposed legislative framework on their current form.[17]

20. The vast majority of climate-related disclosures depend on the threshold question of whether there are, or are not, material financial risks to a particular entity arising from climate change. The relevant threshold is determined by reference to the *sustainability standards*.[18] And the content of the disclosures are set out in the standards. It can be readily accepted that the intention of parliament is that any modifications or exceptions to disclosures as set out in the *sustainability standards* will apply under law.[19]

History of the standards and new regime

21. In May 2022 the Australian people elected the Labor Party to Federal government, replacing the incumbent Liberal/National coalition. The election heralded a shift in climate change politics and gave the Labor party a mandate for action.[20] The Department of Treasury invited stakeholders to participate in consultation from late 2022 about mandatory disclosures and published its *Mandatory climate-related financial disclosures - Policy Position Paper* in September 2023. As noted above, the paper recommended regulator only actions on misleading or deceptive conduct for Scope 3 emissions and forward-looking statements for a fixed period of 3 years.[21] Effectively that meant immunity from private litigation for an extremely broad but ill-defined range of climate-related statements.

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[16] Louise Petschler, 'Update on mandatory climate reporting legislation', *Australian Institute of Company Directors* (Web Page, 1 July 2024) <https://www.aicd.com.au/risk-management/framework/climate/update-on-mandatory-climate-reporting-legislation.html>; AASB, *Disclosure of Climate-related Financial Information* (AASB Sustainability Reporting Exposure Draft ED SR1, October 2023) <https://www.aasb.gov.au/admin/file/content105/c9/AASBED_SR1_10-23.pdf>.

[17] EM p5, [4.1], [4.3], [4.8], [4.11], [4.15], [4.16], [4.25], [4.73], [4.74], [4.75], [4.76], [4.77], [4.78], [4.79], [4.80], [4.81].

[18] Bill, ss 296B(1)(a), 296B(6) <https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r7176_first-reps/toc_pdf/24042b01.pdf;fileType=application%2Fpdf>.

[19] EM [4.76] – [4.81].

[20] See for example: https://www.bbc.com/news/world-australia-61539426.

[21] Department of Treasury, *Mandatory climate-related financial disclosures - Policy Position Paper,* September 2023, 29: https://treasury.gov.au/sites/default/files/2024-01/c2024-466491-pia.pdf.

22. On 23 October 2023, the *Australian Sustainability Report Standards – Disclosure of Climate-related Financial Information* Exposure Draft ED SR1 was published by the Australian Accounting Standards Board (**AASB**).[22] The AASB is a non-corporate government entity located in the Department of Treasury.[23] Comments were sought by the AASB by 1 March 2024.[24] The most recent project updates were released by the AASB on 23 February 2023, before the proposed legislation was released.[25] Nine months after the publication of the draft *sustainability standards*, there has been no suggestion of any changes to its contents. As of 4 July 2024, the AICD says the AASB was "analysing" the *sustainability standards*.[26]

23. Meanwhile, to illustrate the near finality of the *sustainability standards*, in April 2024 the Federal government rolled out an opt-in regime for corporate Commonwealth entities to report against for the 2023/2024 Financial Year that ended 30 June 2024. The reporting regime is based on the draft standards.[27] Corporate Commonwealth entities, including Export Finance Australia (**EFA**), an export credit agency, and the A$7 billion Northern Australia Infrastructure Facility (**NAIF**), will be subject to the reporting requirements and the immunity in the proposed legislation.[28]

24. The *sustainability standards* will buttress existing requirements for Commonwealth entities to report on the environmental impacts and effects of their activities.[29]

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[22] AASB, 'Exposure Draft ED SR1 Australian Sustainability Reporting Standards – Disclosure of Climate-related Financial Information' (News, 23 October 2023) <https://aasb.gov.au/news/exposure-draft-ed-sr1-australian-sustainability-reporting-standards-disclosure-of-climate-related-financial-information/>.

[23] Department of Finance, *Flipchart of PGPA Act Commonwealth entities and companies (191)* (Flipchart, 1 March 2024) <https://www.finance.gov.au/sites/default/files/2024-03/Flipchart%201%20March%202024%20-%20FINAL.pdf>.

[24] AASB ED SR1.

[25] 'Australian Accounting Standards Board', Project Summaries (Web Page) <https://aasb.gov.au/current-projects/project-summaries/> ; 'Australian Accounting Standards Board', Climate-related Financial Disclosure (Online document, 23 February 2024) <https://aasb.gov.au/media/ukbp1lmn/ps_climate_02-24.pdf>; 'Australian Accounting Standards Board', Sustainability Reporting (Online document, 23 February 2024) <https://aasb.gov.au/media/zxhn4trd/ps_sr_02-24.pdf>.

[26] Louise Petschler, 'Update on mandatory climate reporting legislation', *Australian Institute of Company Directors* (Web Page, 1 July 2024) <https://www.aicd.com.au/risk-management/framework/climate/update-on-mandatory-climate-reporting-legislation.html>.

[27] Department of Finance Climate Action in Government Operations, *Commonwealth Climate Disclosure Pilot Guidance FY2023-24* (Annual Reporting, 30 June 2024) <https://www.finance.gov.au/sites/default/files/2024-04/commonwealth-climate-disclosure-pilot-guidance.pdf>.

[28] See for example: Australian Government Solicitor, *Public Governance, Performance and Accountability Act 2013 – what are the key changes for Commonwealth companies?* - Fact Sheet 34, p1, that states the Corporations Act is the principal regulatory framework for Commonwealth companies: https://www.ags.gov.au/sites/default/files/Fact_sheet_No_13.pdf.

[29] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 516A.

However, compliance by government entities with these standards has faced legal scrutiny. In July 2023 Jubilee Australia, a research charity, filed a case in the Federal Court of Australia alleging both EFA and NAIF had failed to adequately disclose the environmental impacts and effects of their financing activities, including Scope 3 emissions.[30] Given such allegations of inadequate disclosures by government providers of tax-payer backed subsidies to the fossil fuel industry, some believe the Australian government itself, via the Department of Treasury, is motivated to legislate the immunity to protect government entities on an ongoing basis.

25. An exposure draft of the legislation was published by Treasury for consulting commencing 12 January 2024.[31] The immunity provision proposed that for three years, private litigants could not bring civil proceedings against companies or directors for statements in *sustainability reports* about Scope 3 emissions and scenario analysis. If those statements were repeated by the company elsewhere outside of a sustainability report, then the immunity did not apply. Only ASIC could bring civil actions during the immunity period.[32] In the exposure draft, the immunity did not extend to transition plans.

26. The Treasury received 128 submissions. The AICD submission contained an Executive Summary. The first four points in it sought an extension to the immunity including to transition plans. The AICD did not refer to the protections in the *sustainability standards*.[33]

27. The Department of Treasury largely complied with the AICD's requests. An updated bill was introduced to Parliament on 27 March 2024.[34] The Bill extended the immunity to transition plans, statements made outside of sustainability reports in certain

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[30] *Jubilee Australia Research Centre v Export Finance and Insurance Corporations & Ors,* Federal Court of Australia, NSD724/2023. Details available here: https://equitygenerationlawyers.com/case/jubilee-v-efa-and-naif/.
[31] 'Treasury (Cth)', Climate-related financial disclosure: exposure draft legislation (Web Page) <https://treasury.gov.au/consultation/c2024-466491>.
[32] *Treasury Laws Amendment Bill 2024: Climate-related financial* disclosure, Exposure Draft, proposed s 1705C of the *Corporations Act*: https://treasury.gov.au/sites/default/files/2024-01/c2024-466491-leg.pdf.
[33] Available in the zip file for Submissions A-B linked at https://treasury.gov.au/consultation/c2024-466491.
[34] Treasury, Parliament of Australia, Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024 (27 Mar 2024) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7176>.

circumstances and gave additional blanket coverage to all forward looking statements in the first published sustainability reports.[35]

28. The Bill was immediately referred to the Senate Standing Committees on Economics for inquiry. Submissions could be provided over the course of 14 days which included a four day public holiday for Easter. The committee received 26 submissions.[36] Many stakeholders understood this round of submissions to be largely redundant with briefings provided to the effect that all major issues had been decided and there was nothing more to negotiate. The AICD's submission was effusive in its praise of Treasury, stating:[37]

> we consider the Bill strikes a sensible and pragmatic balance which should achieve its stated policy objectives. To provide business certainty and facilitate a timely uplift in reporting practices, we encourage the Bill to be passed without undue delay.

29. Again, the AICD did not refer to the safeguards in the *sustainability standards* or in general law.

30. The Committee reporting on the Bill referred to evidence of the overreach in the immunity but did not address it. It noted that "industry stakeholders and Treasury have reflected positively on the extensive consultation process" and recommended that the Bill be passed.[38] Dissenting reports noted the overreach of the scope and duration of the immunity and made recommendations to abandon some or all of it.[39] For example, Independent Senator David Pocock's first recommendation was to remove the immunity, stating:[40]

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[35] Bill, proposed s 1707B of the *Corporations Act*: https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r7176_first-reps/toc_pdf/24042b01.pdf;fileType=application%2Fpdf.

[36] See all submissions to the Senate Standing Committees on Economics here.

[37] Australian Institute of Company Directors, Submission 15 to Senate Economics Legislation Committee, *Senate Inquiry into the Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024* (11 April 2024), 1, available at <https://www.aph.gov.au/DocumentStore.ashx?id=1337caa3-0c2d-4aa2-aee4-d5249b3c600e&subId=754426>.

[38] Senate Economics Legislation Committee, main report [2.36]-[2.46], [2.92], [2.94]: https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/RB000367/toc_pdf/TreasuryLawsAmendment(FinancialMarketInfrastructureandOtherMeasures)Bill2024[Provisions].pdf.

[39] Ibid, Greens dissenting report [1.14]-[1.26] pp69-70; Senator David Pocock dissenting report [1.7] to [1.31]

[40] Senator David Pocock dissenting report, Recommendation 1, [1.24] to [1.29].

The staged requirement for preparation of sustainability reports is sufficient to allow corporations that are not currently engaged in climate reporting to develop that capacity. That is in fact the purpose of the transitional period structure set out in the Bill. This approach fundamentally undermines the argument for a modified liability regime.

The need for better corporate climate reporting is the very aim of these provisions of the Bill. How is that aim achieved by a proposal that denies investors their existing right to test the largest carbon producing and emitting companies' representations?

Given the decades of lost opportunity to address the impacts of climate change in this country, we simply don't have the luxury of time any more to dispense liability holidays to large fossil fuel producers and emitters, especially absent any good articulated reason to do so.

At the hearing, representatives of the Treasury claimed that the risk of greenwashing is addressed by the fact that ASIC will ensure that "reporting is appropriate". This claim lacks credibility in light of the well documented under-resourcing and overburdening of the regulator. Indeed, James Shipton, the former ASIC chairman is reported to have said that the body has been asked to do too much with too little, leaving it chronically underfunded.

There can be no confidence that ASIC will act to prevent greenwashing in the context of sustainability reports in the absence of additional resources.

Recommendation 1

Remove the liability modification provisions in s 1707D so as to restore shareholder' rights in relation to companies' climate representations under the new regime.

The content of the standards and the new disclosure regime

31. The *sustainability standards* require the publication of information relating to Governance, Strategy, Metrics and Targets.[41]

32. The **Governance** information maps closely to the disclosure requirements already in place for ASX listed companies.[42]

33. The **Strategy** information maps closely to the existing disclosure requirements for ASX listed companies.[43]

34. **Risk Management** disclosures focus on enabling users of general purpose financial reports to understand the process of identifying, assessing, prioritising and monitoring climate-related risk and opportunities. Information shall be disclosed about whether, and if so how, an entity uses scenario analysis to inform its identification of climate change risk. The requirements here codify directors' duties of care, skill and diligence when managing climate risk.

35. The **Metrics and Targets** requirement maps closely to the requirements of the TCFD, with which 76% of ASX200 companies purport to comply.[44] There is also overlap with common law requirements to disclose material information required by investors.[45]

36. Climate risks and opportunities for a particular entity inform the disclosures. The climate-relevant risks and opportunities, to meet the threshold for disclosure, must satisfy a two-step test:[46]

    (a) the information could reasonably be expected to impact the entity's prospects; **and**

    (b) the information could reasonably be expected to influence decisions of investors.

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[41] https://www.aasb.gov.au/admin/file/content105/c9/AASBED_SR1_10-23.pdf

[42] AASB ED SR1 [26]-[27]; *Corporations Act* s 674; ASX Listing Rule 4.10.3; ASX Governance Council Principles and Recommendations.

[43] AASB ED SR1 [28]-[42]; *Corporations Act* s 299A; ASIC Regulatory Guide 247

[44] Corporate and prudential regulators ASIC and APRA in Australia recommend that entities comply with the TCFD. The ASX Listing Rules do as well (see the summary provided in the Hartford-Davis Advice at [11] per fn 4 above); TCFD recommendations.

[45] Under legal principles relating to misleading conduct by omission

[46] AASB ED SR1 [17], [18]

37. On its face, this is consistent with the standard that Australian businesses are required to meet to avoid misleading conduct by silence or omission. Here disclosure is required if there is a "reasonable expectation" that it should be.[47] Misleading conduct is determined by reference to whether it is expected to influence investors' decisions.

38. Therefore, changes to required disclosures by the proposed climate-related disclosure standards do not overly extend the current principle-based disclosure requirements under Australian law.

39. Further protections are available to disclosing entities based on specific attributes and circumstances of the discloser. Under the *sustainability standards* entities do not need to assess anticipated financial effects of a climate-related risk or opportunity if it involves undue cost or effort, or if the information is not reasonably available.[48] Entities need only rely on the skills, capabilities and resources available to them.[49] If climate-related financial effects are not separately identifiable, or if measurement uncertainty involved in estimating those effects is so high that the quantitative information would not be useful, then no disclosure is required.[50] Further, entities do not need to provide quantitative information about the anticipated financial effects of a climate-related risk or opportunity if the entity does not have the skills, capabilities or resources to provide that information.[51]

40. Similarly, Metrics only need to be disclosed in relation to a climate-related risk and opportunity if:

    (a) the risk or opportunity could reasonably be expected to affect the entity's prospects; or

    (b) required by an applicable Australian Sustainability Reporting Standard.

41. The reasonable expectation of any effects on the entity is in the context of identifying qualitative and quantitative aspects which are tempered by the protections noted above.

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[47] *Nadinic v Cheryl Drinkwater as trustee for the Cheryl Drinkwater Trust* [2020] NSWCA 2, [40].
[48] AASB ED SR1 [37(a)].
[49] AASB ED SR1 [37(b)]
[50] AASB ED SR1 [38]
[51] AASB ED SR1, [39].

42. These provisions are also designed to protect smaller entities. Again, this carve out maps closely to the subjective considerations of current Australian laws. They include, for misleading conduct, consideration of the circumstances and qualities of entities, and the users of the relevant information, as noted above. To comply with their duties under the Corporations Act, directors of Australian companies are required to act with the degree of care and diligence of a reasonable person in the position of that director.[52]

43. ASX listed entities are already required to disclose strategies to deal with material risks and opportunities, including climate risks where they are material.[53] Large Australian companies adopt the Climate Action 100+ investor-led regime, which requires an annual climate report to be put to a shareholder vote. Currently, there are 14 focus companies in Australia worth US$352 billion in market capitalisation.[54] A relatively recent updated synopsis of the range of required climate-related disclosures and relevant regulatory guidance can be found in the Hartford-Davis December 2022 advice referred to above at paragraph 7.[55]

44. The exposure draft legislation, discussed at paragraph 25, above applied immunity only to statements in entities' sustainability reports about Scope 3 emissions and scenario analyses.

45. Consistent with other existing disclosure requirements, the proposed legislation only requires the use and disclosure of scenario analysis if required by the *sustainability* standards.[56] Specifically, the *sustainability standards* require disclosure about scenario analysis only if:

    (a) required by other Australian Sustainability Reporting Standards; or otherwise

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[52] *Corporations Act* s 180. For commentary on the subjective requirements of directors' duties see Hutley (2016) at [8], [9], https://cpd.org.au/wp-content/uploads/2016/10/Legal-Opinion-on-Climate-Change-and-Directors-Duties.pdf

[53] *Corporations Act* s 299A, *ASIC RG* 247 [59] to [66].

[54] 'Climate Action 100+', Companies (Web Page) <https://www.climateaction100.org/whos-involved/companies/?search_companies&company_region=australasia>.

[55] Australian Council of Superannuation Investors Limited, *Advice Regarding Potential Liability of Directors Under the ISSB Draft Standards for Forward Looking Statements* (16 December 2022) [7]-[12], [19]-[21] <https://igcc.org.au/wp-content/uploads/2023/01/Advice-on-ISSB-Draft-Standards-Final.pdf>.

[56] Proposed s 296D(1), noting that the government has since proposed further amendments to standardise the climate pathways for any scenario analysis. See Government [sheet PC111 revised] available on the bill webpage here: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7176

(b) it is used by the entity, and if so, how.[57]

46. We currently understand that there are no reporting standards that require the use of scenario analysis. The use of scenario analysis is therefore discretionary.

47. Similarly, the proposed *sustainability standards* already build in protection for entities and their directors on Scope 3 emissions disclosures. At the outset, it is worth noting that any Scope 3 emissions disclosure is a requirement of Metrics or Targets, which in turn is dependent on materiality.

48. Further, an entity does not have to obtain information that would result in undue cost or effort.[58] Likewise, the protections around measurement uncertainty referred to above means that an entity, for any "amounts" in its sustainability report, including on Scope 3 emissions, identifies the sources of measurement uncertainty and any assumptions, approximations and judgements the entity has made in measuring the amounts.[59] Entities routinely make estimates in their reporting, the *sustainability standards* merely operate to require identification of those estimates. The standards state:

> When amounts reported in climate-related financial disclosures cannot be measured directly and can only be estimated, measurement uncertainty arises. In some cases, an estimate involves assumptions about possible future events with uncertain outcomes. The use of reasonable estimates is an essential part of preparing climate-related financial disclosures and does not undermine the usefulness of the information if the estimates are accurately described and explained. Even a high level of measurement uncertainty would not necessarily prevent such an estimate from providing useful information.
>
> The requirement in paragraph 77 for an entity to disclose information about the uncertainties affecting the amounts reported in climate-related financial disclosures relates to the estimates that require the entity's most difficult, subjective or complex judgements. As the number of variables and assumptions increases, those judgements become more subjective and complex, and the uncertainty affecting the amounts reported in the climate-related financial disclosures increases accordingly.

[57] AASB ED SR1 [42], [44(a)(ii)].
[58] AASB ED SRS 1, B39.
[59] AASB ED SRS 1, 77.

49. These “measurement uncertainty” provisions dictate required disclosure, but also operate to protect entities and their directors where accurate measurement is difficult. No further immunity is required if management is competent and companies disclose the necessary information with appropriate caveats for measurement uncertainties.

Do other jurisdictions provide immunity for mandated climate disclosures?

50. Globally, more than 20 countries are proposing to adopt the ISSB standards. Those jurisdictions represent nearly 55% of global GDP, more than 40% of global market capitalisation, and over half of global greenhouse gas emissions.[60] Our review of the proposed sustainability disclosure frameworks in other jurisdictions did not reveal any proposals for immunity from private litigation as is proposed in Australia.[61]

51. For example, the United Kingdom’s proposal to legislate its Sustainability Disclosure regime that commences on 1 January 2026 will not provide a safe harbour for participants.[62] United Kingdom investors required to report against those standards, including with respect to their Australian investments, may face difficulties when relying on market statements by Australian companies that have the benefit of the immunity, and are not subject to a comparable degree of transparency.

52. Further, the European Union is adopting the Corporate Sustainability Due Diligence Directive (**CSDDD**) which would place European investors in the Australian market in an unenviable position.[63] Competent directors of European investors will be overseeing preparations for that regime. Early adopters subject to the requirements of the CSDDD will be reviewing disclosures by Australian companies who will have the benefit of the

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[60] Sara Feijao, 'More than 20 jurisdictions in the process of adopting ISSB standards', *Linklaters* (Blog, 30 May 2024) <https://sustainablefutures.linklaters.com/post/102j8u0/more-than-20-jurisdictions-in-the-process-of-adopting-issb-standards>.

[61] 'IFRS', *Jurisdictional sustainability consultations* (Web Page) <https://www.ifrs.org/ifrs-sustainability-disclosure-standards-around-the-world/jurisdiction-consultations-on-sustainability-related-disclosures/>. We note the SEC’s proposal to effectively map existing director protections on forward looking statements to climate related disclosures. See for example https://viewpoint.pwc.com/dt/us/en/pwc/in_depths/2024/id2024/id202401.html

[62] Treasury - Government of the United Kingdom Sustainability Disclosure Requirements: Implementation Update 2024 (Policy Paper, 16 May 2024) <https://assets.publishing.service.gov.uk/media/66505ba9adfc6a4843fe04e5/Sustainability_Disclosure_Requirements__SDR__Implementation_Update_2024.pdf>.

[63] 'European Commission', *Corporate sustainability due diligence* (Web Page) <https://commission.europa.eu/business-economy-euro/doing-business-eu/sustainability-due-diligence-responsible-business/corporate-sustainability-due-diligence_en>.

immunity. Overseas investors must therefore consider an additional layer of risk and complexity when it comes to Australian companies not subject to the same degree of public transparency. This may lead to more hesitant investment of international capital in Australia's transition.

The scope of the proposed immunity and the company regulator, ASIC

53. Under the proposed new disclosure regime, Australian entities will be immune from all investor litigation relating to all forward-looking statements related to climate and made for the purpose of complying with the sustainability standards if they are made in sustainability reports for financial years commencing within the first 12 months from the start date.[64] The proposed start date of the regime is 1 January 2025. The bill must be passed by 3 December 2024 otherwise the start date will be pushed back by 6 months.[65] Most Australian entities' financial years commence on 1 July. Annual reporting that will include a sustainability report takes place within 4 months of the end of each financial year.[66] This means that most sustainability reports published toward the end of the 2026 financial year will attract immunity on all forward-looking statements.

54. Australia's corporate regulator, the Australian Securities and Investment Commission (**ASIC**), is the only regulator which retains the power to prosecute entities for misleading and deceptive conduct in the first three years of the regime. Australia has two other relevant regulators that can feasibly act to protect market integrity. The first is the *Australian Prudential Regulatory Authority* (**APRA**) which has jurisdiction over a broad range of financial services. The second is the *Australian Competition and Consumer Commission* (**ACCC**) which has jurisdiction to enforce a range of conduct impacting consumers. Neither regulator can bring actions in the first three years of the regime on transition plans.

55. Under the new regime, ASIC retains powers to give directions to entities it considers have made statements that are incorrect, incomplete or misleading.[67] An entity must comply or it will face a fine.[68] Entities are not immune to prosecution by ASIC for misleading or deceptive conduct. Neither are entities immune from criminal

[64] EM [4.197]
[65] Section 1707, ***start date*** definition.
[66] *Corporations Act* s 319(b).
[67] EM [4.108], s 296E(1)
[68] EM [4.1100]

proceedings.[69] The stated policy intention is to ensure that for the first three years of operation, ASIC can undertake a role that promotes education about compliance with the new reporting regime and deter poor behaviours and reporting practices that are contrary to the objectives of the new reporting regime.[70]

56. ASIC's submission on the Bill was less than two pages.[71] It merely stated that "ASIC will engage with and assist entities to meet the reporting requirements." ASIC's foreshadowed approach, and the approach to issuing directions and fines foreshadowed in the Explanatory Memorandum, appears broadly consistent with the regulator's current practice.

57. The parliamentary *Inquiry into ASIC's capacity and capability to respond to reports of alleged misconduct* delivered a scathing report on 3 July 2024.[72] It said:[73]

> The AICD observed significant public interest in enforcing deceptive conduct provisions and continuous disclosure laws. They stated that '[t]here is a reasonable expectation that the corporate regulator should play an active enforcement role on these issues, rather than private litigants.'
>
> …
>
> As with many areas of ASIC's work, the committee finds itself concerned with ASIC's enforcement. ASIC's enforcement powers are wide ranging, there are a number of tools available to it, and yet the evidence received repeatedly through this process shows that ASIC is not using those tools.
>
> It is clear that the community has broad concerns about ASIC's enforcement. The case studies the committee has explored in this chapter demonstrate the limitations of ASIC's enforcement culture and have shown it wanting.

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[69] EM [4.190], [4.191]]; s 1707D
[70] EM [4.196]
[71] https://www.aph.gov.au/DocumentStore.ashx?id=c93d4f42-b2b6-4423-8cce-16608000d71c&subId=754171
[72] Economics References Committee, The Senate, *Australian Securities and Investments Commission investigation and enforcement* (Interim Report, June 2024) <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/RB000117/toc_pdf/AustralianSecuritiesandInvestmentsCommissioninvestigationandenforcement.pdf>.
[73] Economics References Committee, The Senate, *Australian Securities and Investments Commission investigation and enforcement* (Interim Report, June 2024), [5.139], [5.141], [5.142] <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/RB000117/toc_pdf/AustralianSecuritiesandInvestmentsCommissioninvestigationandenforcement.pdf>.

58. Consistent with the findings above, in our view, ASIC prioritises fines against small companies and easy to win cases when it prosecutes greenwashing. Such actions do not promote a broad change in corporate conduct in Australia. The following two examples demonstrate the point.

59. ASIC lauds its enforcement of greenwashing for companies on 'carbon neutral' statements.[74] ASIC's 5 January 2023 media release stated "ASIC issued eight infringement notices for alleged greenwashing in 2022 and has started the year with further action against a listed company". Three of those infringement notices were to Black Mountain Energy Ltd (BME). While BME is a listed company, its market cap is $3 million and at the time of writing it ranked 2,213 of 2,383 in company size of those listed on the ASX. However, ASIC's so-called "further action" at the start of 2023 appeared to be no more than receiving payment by BME in the amount of A$39,960 on 3 January 2023.

60. By way of comparison, private litigation has been issued against Australia's third largest polluter that has 1.6 million retail electricity customers and employs 2,300 people. It was brought by a non-government organisation about the company's 'carbon neutral' statements.[75]

61. Another of ASIC's lauded greenwashing cases was against Vanguard having an ESG-related fund that did not exclude certain companies. Vanguard based its fund on an MSCI index that was faulty. Vanguard self-reported the matter to ASIC and admitted fault.[76] ASIC then proceeded to litigate and issued a number of media releases lauding its greenwashing action.[77]

62. The new reporting regime - and the immunity - applies to asset managers like Vanguard. It also applies to superannuation funds.[78]

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[74] ASIC, 'ASIC issues infringement notices to energy company for greenwashing' (Media Release 23-001MR, 5 January 2023), https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-001mr-asic-issues-infringement-notices-to-energy-company-for-greenwashing/.

[75] See for example: https://equitygenerationlawyers.com/case/ap4ca-v-energyaustralia/

[76] *Australian Securities and Investments Commission v Vanguard Investments Australia Ltd* [2024] FCA 308, [27]: https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2024/2024fca0308

[77] ASIC, 'ASIC wins first greenwashing civil penalty action against Vanguard' (Media Release 24-061MR, 28 March 2024), <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2024-releases/24-061mr-asic-wins-first-greenwashing-civil-penalty-action-against-vanguard/>.

[78] EM [4.26].

63. By further comparison, private litigation is being taken against Australia's largest fossil fuel companies. The companies are Woodside Energy Group Ltd, valued at A$56 billion and Santos Ltd valued at $26 billion. Both are in the top 20 ASX listed companies. The actions are taken by charitable investor and environmental organisations with respect to the accuracy of company transition plans. Lawyers for the charities say those cases would not be possible with the benefit of the proposed immunity.[79]

Private litigation and directors' duties

64. In this section we interrogate the risks to directors from private litigation on climate change issues. The first investor litigation on climate change in Australia was *Abrahams v Commonwealth Banks of Australia,* filed in 2017. Two shareholders alleged the bank failed to comply with s 299A of the *Corporations Act* because it did not identify climate change as a material risk in its 2016 annual report. The Act provides that a company director also breaches the law if they failed to take all reasonable steps to comply with, or secure compliance, with a range of company law, including s 299A.[80] Did the Abrahams attempt to sue the bank's directors? No. Did the bank change its conduct and did the Abrahams discontinue the proceeding? Yes and Yes. The proposed immunity will do away with this type of legal action for a period of three years, hindering the public interest in corporate transparency.

65. In 2018, a 23 year old superannuation fund (pension fund) member, Mark McVeigh, filed proceedings against the Retail Employees Superannuation Trust (**Rest**) in the Federal Court of Australia. His case alleged the trustee breached its duties. Mr McVeigh said the trustee was not acting with the requisite degree of care skill and diligence nor in his best interest. Simply put, the case was brought because Rest did not consider climate change risks when making investments on his behalf.[81] Despite the statutory regime mandating exactly the same standards for trustee directors,[82] Mr McVeigh did not allege misconduct by the directors. Would this litigation have been

[79] Environmental Defender's Office, Submission 3 to Senate Economics Legislation Committee, *Senate Inquiry into the Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024* (10 April 2024), 3 <https://www.aph.gov.au/DocumentStore.ashx?id=afa5b6a7-6f50-4548-a005-874f1284350d&subId=754194>.

[80] Corporations Act s 344.

[81] *Superannuation Industry (Supervision) Act 1993* s 52(2)(b) and (c).

[82] *Superannuation Industry (Supervision) Act 1993* s 52A(2)(b) and (c).

possible with the proposed immunity? We think not because the allegations dealt with what was essentially a lack of a climate plan, which is the type of information likely protected by the immunity.

66. In the Australian climate litigation landscape, the concept of directors' duties in the Anthropocene was given prominence in a 30 October 2016 paper by barristers Noel Hutley SC and Sebastian Hartford-Davis on instruction from Sarah Barker.[83] A number of opinions followed on more particular aspects of the legal environment in Australia. Superannuation funds, for example, were advised in 2021 that climate change was likely a material financial risk to funds and trustees (and their directors) had duties to understand and manage those risks.[84]

67. In April 2021, Mr Hutley SC and Mr Hartford-Davis provided an opinion on net zero statements. They pointed out:[85]

> Directors may also face personal liability as a result of "stepping stone liability", where, by facilitating the making of the [misleading] misrepresentation, they will be found to have breached their own duties of care.

68. Despite this possibility, neither of the two cases on misleading conduct referred to at paragraph 63 above involved directors.

69. Further, litigation has been brought against banks by shareholders who held governance concerns about the banks under a procedure known as 'inspecting the books'.[86] The proposed immunity serves to protect companies from the substantive aspects of these types of actions relating to climate change disclosures.

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[83] Noel Hutley SC and James Mack, *Superannuation Trustee Duties and Climate Change* (Memorandum of Opinion, 16 February 2021) <https://cpd.org.au/wp-content/uploads/2016/10/Legal-Opinion-on-Climate-Change-and-Directors-Duties.pdf

[84] Noel Hutley SC and Sebastian Davis Hartford, *Superannuation Trustee Duties and Climate Change* (Memorandum of Opinion, 7 October 2016) <https://equitygenerationlawyers.com/wp/wp-content/uploads/2021/04/Hutley-SC-Mack-Superannuation-Trustee-Duties-and-Climate-Change-Memo-2021.pdf>.

[85] Noel Hutley SC and Sebastian Hartford Davis, *Climate Change and Directors' Duties* (Further Supplementary Memorandum of Opinion, 23 April 2021), [39] <https://cpd.org.au/wp-content/uploads/2021/04/Further-Supplementary-Opinion-2021-3.pdf>.

[86] *Abrahams v Commonwealth Bank of Australia*, NSD864/2021; *Beere v National Australia Bank*, NSD715/2024; *Corporations Act* s 247A.

70. Inspecting the books is an information gathering procedure that can be a precursor to a derivative action. This is where a Court permits shareholders to step into the shoes of the company to bring litigation against its directors.[87] A Court must give shareholders permission to bring a derivative action to litigate the fiduciary obligations of care and diligence, acting in good faith, use of position and use of information. These are all fiduciary duties codified in the Corporations Act.[88] The duties are owed to the company - not the shareholder.[89]

71. The Hutley SC opinions on directors' duties and climate change were given due weight and attention by industry and media. Notwithstanding this, since the first opinion in 2016, no directors, to our knowledge, have been named in Australian Court proceedings about climate change impacts.

72. In our view, based on recent history and the numerous barriers to litigation against directors, the circumstances in which directors will face climate change-related litigation in the short-term by private litigants are already limited and will only arise where there has been a clearly identifiable breach.[90]

73. The Explanatory Memorandum to the Bill states that the most common legal actions likely to be affected are civil proceedings for misleading or deceptive conduct. These are not directors' duties actions. It is curious that the Explanatory Memorandum for the Bill then specifically calls out directors' duty litigation as a cause of action that will be protected by the proposed immunity. [91]

Significant existing barriers for investor litigation

74. In many instances, private litigation that is within the scope of the proposed immunity has been brought by retail investors, young fund members and public interest organisations. Unsurprisingly, the resources employed by corporate entities accused of

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[87] *Corporations Act* s 236.
[88] *Corporations Act* s 180-183.
[89] Ibid, see also *Foss v Harbottle* (1983) 67 ER 189. Analogies exist in other jurisdictions. Globally, on climate matters, there has been an attempt by activist shareholder ClientEarth to seek permission from a UK Court to bring a derivative claim against the directors of oil company Shell for apparent breaches of duty. The Court refused leave on the basis that ClientEarth failed to make a *prima facie* case of breach, including that Shell's actions on climate change did not fall outside the range of reasonable responses to climate risk. See *ClientEarth v Shell Plc* [2023] EWHC 1897 (Ch).
[90] And for that matter, ASIC.
[91] EM [4.194].

misconduct to fight litigation far outstrip the resources of the plaintiff cohort. Further, organisations and individuals must overcome the fear of a costs order against them if they lose. Barristers in Australia act essentially as gatekeepers to litigation. Overly ambitious cases are liable to be struck out at the early stages of a matter and there are personal disincentives and risks for lawyers who embark on overly ambitious cases.

75. Accordingly, private litigation against large companies and financial institutions has been brought in Australia over the last decade in light of a gun-shy regulator and apparent egregious misconduct. There is a clear tendency for investors and private individuals to step in against the largest players in Australia to fill the vacuum left by the regulator,[92] turning to private litigation to remedy corporate inaction and apparent greenwashing.

Motivation for extra immunity?

76. In our view, Australian companies and Australian investors, the AICD and potentially the Federal government itself, are in favour of the extra immunity not because of the disclosure regime itself, but because the regime will expose bad practice that does not meet the existing requirements of corporate law.

77. The AICD is powerful in Australia. In 2023 its revenue was A$99.9 million[93] (US$66 million, €62 million, £53 million). The AICD, in its own words, "has advocated strongly" for the *extra immunity* and it "will be making the case with all parties and independents as the Bill progresses".[94]

78. The AICD's mission is "To be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society".[95] It is effectively a charity with tax-exempt status. It appears to be doing the bidding of business interests to avoid private litigation based on misconduct. The reality remains,

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[92] See, for example, Setzer J and Higham C (2024) *Global Trends in Climate Change Litigation: 2024 Snapshot*, London: Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science.

[93] The AICD is, interestingly, a registered education charity. Its financials can be found here: https://www.acnc.gov.au/charity/charities/6fd0b104-39af-e811-a960-000d3ad24282/profile

[94] Louise Petschler, 'Update on mandatory climate reporting legislation', *Australian Institute of Company Directors* (Web Page, 1 July 2024) <https://www.aicd.com.au/risk-management/framework/climate/update-on-mandatory-climate-reporting-legislation.html>.

[95] 'Australian Institute of Company Directors', *About AICD* (Web Page) <https://www.aicd.com.au/about-aicd.html>.

however, that climate-related private litigation matters in Australian courts have never named or challenged a director.

Opposition to the immunity

79. Initial concern was raised by the national broadcaster in November 2023. The NSW Bar Association has expressed concern that the proposed immunity would restrict access to justice and undermine Australia's emissions reduction goals.[96]

80. As the Bill reached Australia's Senate, international governance publication *Responsible Investor* published concerns raised by industry groups, including the Australasian Centre for Corporate Responsibility and the Responsible Investment Association Australasia.[97]

81. More recently *The Guardian* cited concerns by investor groups and fund managers about the extent of the immunity.[98]

82. The immunity applies to the largest Australian listed and unlisted companies, superannuation funds, asset managers, Federal government corporations and their directors. This is in circumstances where recent research by the Australian Council of Superannuation Investors reveals that most ASX200 companies are in a strong position to meet new mandatory climate disclosures, with the vast majority having net zero targets and most having set interim targets which are crucial in enabling investors to understand the credibility of a company's ambition.[99] It is notable, however, that stakeholders such as community groups, lawyers, retail investors and superannuation fund members were not initially invited to participate in shaping the disclosure regime.

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[96] Peter de Kruijff, 'Australian lawyers concerned by proposed three-year freeze on corporate greenwashing litigation', *ABC News* (Article, 3 November 2023) <https://www.abc.net.au/news/science/2023-11-03/australian-lawyers-concerned-by-greenwashing-litigation-ban/103049090>.

[97] Fiona McNally, 'Aussie industry groups criticise legal immunity for corporate sustainability reporting – proposed three-year safe harbour from private litigation 'not necessary', observers say', *Responsible Investor* (Article 2 July 2024) <https://www.responsible-investor.com/aussie-industry-groups-criticise-legal-immunity-for-corporate-sustainability-reporting/>.

[98] Adam Morton, 'Climate plans of Australian companies would be exempt from private litigation for three years under proposal', *The Guardian* (Article, 15 July 2024) < https://www.theguardian.com/australia-news/article/2024/jul/15/climate-plans-of-australian-companies-would-be-exempt-from-private-litigation-for-three-years-under-proposal>.

[99] Australian Council of Superannuation Investors, Promises, Pathways & Performance Climate Change Disclosure in the ASX200, July 2024, available at <https://acsi.org.au/wp-content/uploads/2024/07/Promises-Pathways-Performance-Climate-reporting-in-the-ASX200.Jul24final.pdf>.

Australia's promise to international investors and what they can do

83. In October 2023, Australia's government made a promise to investors to update them on important climate change policy settings. After unsuccessfully fighting for years to throw out a Federal Court case by Ms O'Donnell,[100] a retail investor and holder of Treasury Bonds, the Federal government's Department of Treasury made this promise in a settlement statement.[101] The bondholder alleged that Australia was misleading investors by not informing them about climate change risks to Australia's sovereign bonds.

84. The Federal Court judgment approving the settlement said it is likely that events exacerbated by climate change "will give rise to a huge drain on Commonwealth resources and on the tax base over a very lengthy period, perhaps forever, and therefore also weigh on forecasts in relation to the Commonwealth's financial and economic position."[102]

85. The transition is critical, which is why Australia needs to promote policy settings to attract international investment. Australia's settlement statement promised it "will continue to engage with asset owners and relevant stakeholders to ensure that investors are informed as to the Commonwealth's policy settings and actions in relation to the risks and opportunities posed by climate change".[103]

86. The promise sets up a foundation for investors to engage with the Federal government on its climate change policy settings. We invite dialogue with overseas investors on how to engage with Australia's government on the proposed immunity which, as we point out above, is not necessary and runs counter to a market with integrity.

87. We recommend investors engage with the Australian government on the content of the disclosure regime prior to any laws being finalised in the Australian Senate.

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[100] See for example *O'Donnell v Commonwealth* [2021] FCA 1223 <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2021/2021fca1223>.
[101] Department of Treasury (Cth), 'Statement on O'Donnell v Commonwealth' (Media Release, 16 October 2023), <https://treasury.gov.au/media-release/statement-odonnell-v-commonwealth>.
[102] *O'Donnell v The Commonwealth* [2023] FCA 1227, [40] <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2023/2023fca1227>.
[103] Department of Treasury (Cth), 'Statement on O'Donnell v Commonwealth' (Media Release, 16 October 2023), <https://treasury.gov.au/media-release/statement-odonnell-v-commonwealth>.

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